Supreme Court, U.S.
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No. 08-462

IN THE

Supreme Court of the United States

ALISON E. SHIMER,
Petitioner,

COMMODITY FUTURES TRADING COMMISSION
Respondent

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Third Circuit

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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Date: January 5, 2009

QUESTION PRESENTED

1. Whether the case law cited in Respondent's brief in opposition provides any support at all for the proposition that federal appellate jurisdiction, though present, may be ignored and effectively denied because its presence was not made clear and obvious to the appellate court until the filing by Petitioner of a timely petition for rehearing.

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ARGUMENT

Respondent's brief in opposition asks this Court to ignore over 150 years of consistent and unswerving support for the well established requirement that once established to the satisfaction of this Court and every other federal appellate court appellate jurisdiction cannot be avoided or ignored (see cases cited in the previously filed petition).

Respondent's primary argument in opposition to grant of the petition now before this Court is the fallacious attempt to equate the issue of appellate jurisdiction to arguments or issues that might affect success on the merits of a particular appeal. To that end on page 8 of its brief Respondent cites to *Peter v. Hess Oil V.I. Corp.*, 910 F.2d 1179, 1181 (3d Cir. 1990) for the general proposition that "Courts of appeals are not obligated to address matters that are not timely raised, and they *ordinarily* decline to consider claims raised for the first time in a petition for rehearing". (Emphasis added).

In *Peter* the plaintiff Conrad Peter had filed a common law tort law suit against Hess Oil Virgin Islands Corp. In his appellate brief he had failed to argue the inapplicability of the Longshore and Harbor Workers' Compensation Act ("LHWCA") to the territorial waters of the Virgin Islands. The appellate court held (in the absence of any argument in Peter's brief to the contrary) that the LHWCA applied and preempted his common law tort cause of action.

It is also worth noting that in justifying its refusal to grant panel rehearing on whether the LHWCA applied to the territorial waters of the Virgin Islands the appellate court also summarily rejected counsel's contention the LHWCA issue impacted the subject matter jurisdiction of the appellate court: "We have jurisdiction to decide this appeal without regard to whether LHWCA applies or does not apply to the territorial waters of the Virgin Islands. See 28 U.S.C. Sec 1294(3)." *Peter* at 1181.

Clearly *Peter* is insufficient precedent for permitting an appellate court to literally *ignore* its own appellate jurisdiction when a sufficient basis for finding such jurisdiction to exist is cited in a timely filed petition for rehearing. The "claim" of Petitioner Shimer in her reply to the Receiver Stephen T. Bobo's motion to dismiss was that mootness did not apply to her appeal. That there might be another alternative (and perhaps more forceful reason) for recognizing the existence of appellate jurisdiction is clearly not only an appropriate but a *necessary* reason to file a petition for rehearing.

The general principle that an issue not addressed initially in an appellate brief will usually not be reviewed in a later petition for rehearing certainly makes great practical sense when the issue or argument not properly raised and briefed goes to the merits of the matter appealed. Otherwise the inadvertence of counsel becomes a basis for unreasonably and unnecessarily extending the process and duration of appellate review. That is not the case in the matter now before this Court. The issue of mootness was first raised in the Receiver's motion to dismiss filed *after* submission of Petitioner's brief addressing the merits of her appeal.

The underlying justification for support for the proposition that "Panel rehearing is not a vehicle for presenting new arguments..." *Easley v. Reuss*, 532 F.3d 592, 593-594 (7th Cir. 2008) cited on page 9 of Respondent's brief apparently lies in the general principle of waiver. It is reasonable to conclude that an issue not properly raised at its appropriate time during the appellate process need not be later

considered on a petition for rehearing. But the 7th Circuit Court recognized (as indicated in the entire quote from *Easley* on page 9 of Respondent's brief) that "extraordinary circumstances" might permit exception to that otherwise generally accepted rule.

The erroneous nature of a previous denial of appellate jurisdiction clearly qualifies as a "circumstance" of sufficient extraordinary nature to not only permit but to arguably *require* application of the exception noted in *Easley*. A grant of the petition now before this Court would not disturb or impair *in any way* the propriety of the rehearing petition denials of either *Peter* or *Easley*[1] nor would it be inconsistent with the per curiam decision of this Court in *United States v. Levy*, 416 F.3d 1273, 1275-1276 (11th Cir.) (per curiam), cert denied, 546 U.S. 1011 (2005).[2]

On page 5 of its brief the Respondent seeks support for its argument that Petitioner sought only an advisory opinion from the appellate court by citing to the fact that her appellate brief did not specifically outline and describe to the appellate court all of the possible equitable remedies that *might* flow from a merits based decision in her favor. On that page 5 of Respondent's brief we find

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[1] In *Easley* the petition for rehearing was denied for failure to initially brief or argue before the appellate court the state-created danger exception to the Due Process clause.

[2] Defendant Levy's conviction for conspiracy to commit mail fraud and money laundering was affirmed and then his petition for rehearing was denied for failure to assert in his appellate brief a claim of error per *Blakely v. Washington* 542 U.S. 296 (2004).

reproduced for the Court a sentence from Petitioner's appellate brief where she stated that the relief sought in her appeal was "A decision...that concludes no sound legal or equitable basis existed for ordering funds... to be released... ."

The Respondent has cited to this Court no decision of any court that requires Petitioner to lay out and provide to the appellate court *all of the possible equitable remedies* that might flow from a decision in her favor on the merits of her appeal. Petitioner only acknowledged in her appellate brief the practical impossibility of fashioning any equitable relief *that included a recall of funds already distributed by the Receiver* per the order of the district court.

It was completely appropriate in the context of the jurisdictional issue now presented to this Court for the Petitioner to remind the appellate court in a timely fashion in her petition for rehearing what was already apparent from the record: the consent orders of the district court were sufficient *on their face* to allow Petitioner (if successful on the merits) a remedy sufficient under the standard enunciated in *Mills v. Green,* 159 U.S.651 (1895) to avoid application of mootness to her appeal.

If the appellate court itself is without power or authority to deny or refuse jurisdiction once it is clearly established to exist under case law precedent of this Court, how is it possible to ever apply a "timeliness" standard to the issue now raised by Petitioner Shimer and conclude that *at any time during the appellate process* she was capable of

waiving or abandoning a right to insist upon that which the appellate court had no power to refuse or deny?

Neither *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147n. 2 (1970) nor *Taylor v. Freeland & Kronz*, 503 U.S. 638, 645-646 (1992) preclude grant of the petition now before this Court.[3] The failure of the appellate court to address the jurisdictional question raised by Shimer's petition for rehearing was clear reversible error in light of previous decisions of this Court that emphasize the *necessity* of accepting appellate jurisdiction when it is found to exist.

Justice O'Connor's expressed concern in *Wills v. Texas*, 511 U.S. 1097,1097-1098 (1994) cited by Respondent on page 9 about the usual preference for having the benefit of the appellate court's "...application of [the rule] to the facts..." need not apply when the issue is purely a question of federal jurisdiction. Justice O'Connor's cited remarks in *Wills* were addressed to the absence of any decision by the state appellate court that applied the facts in *Wills* to the defendant's claim that the jury should have been provided the opportunity to give mitigating effect to his mental retardation at capital sentencing. In the present matter this Court has all

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[3] As noted by Respondent this Court refused in *Adickes* at 147, fn 2 to consider that petitioner's challenge to the district court's denial of a request to amend her complaint to include a third count when that alleged error by the district court was never argued before the court of appeals. In *Taylor* this Court refused to entertain a new argument by a trustee in bankruptcy not set forth in the petition for certiorari citing to the provisions of Rule 24.1(a).

that it needs in the record before it to apply its own previous precedent and determine if the appellate court's refusal to review Shimer's petition for rehearing and accept jurisdiction was proper and acceptable.

It was appropriate, proper and timely for Petitioner to point out to the appellate court in her petition for en banc rehearing that appellate jurisdiction indeed existed. It was inappropriate and an abuse of its discretion for the appellate court to refuse to recognize its jurisdiction with respect to Petitioner Shimer's appeal when a firm and sound basis for that jurisdiction was presented in her petition for en banc review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 5, 2009